In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1476

UNITED STATES OF AMERICA,
Petitioner,

vs.

WILLIE FOSTER SELLERS,
Respondent.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR RESPONDENT SELLERS

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STATEMENT

The statement of the case and of the facts as contained in the Government's Petition are substantially correct for present purposes. It is to be noted, however, that while the robbery occurred in Fallston, North Carolina, on August 9, 1973, it was not until September 25, 1973, in Atlanta, Georgia (TR. 251), that Sellers' apartment was searched. We think that the record will reflect that he was subsequently indicted on the charges for which he was tried. It was the September 25, 1973, search of Sellers' apartment during which the $33,150 in cash, including $500 of the "bait" money was discovered. The unlawfulness of that search is, in part, the subject of Sellers' Petition in No. 74-6503, which is now before this Court.

RESPONSE TO GOVERNMENT'S PETITION

In *Milanovich* v. *United States*, 365 U.S. 551, a case arising in the Fourth Circuit, this Court was concerned with convictions of theft and receiving stolen money from a commissary store at a Naval Base, in violation of 18 USC 641. The trial court had approved the verdict and imposed concurrent sentences. On appeal to the Fourth Circuit, that court, with one judge dissenting (275 F.2d 716), based upon *Heflin* v. *United States*, 358 U.S. 415, set aside the concurrent sentence imposed on the receiving count, but affirmed as to the theft count. In this Court it was argued that the relief granted was not enough; that the theft count should also be reversed and the case remanded for a new trial. The argument followed that although the evidence would support a conviction for either the theft or the receiving, the jury should have been instructed that it could not convict for both. This Court agreed and reversed the case for a new trial.

In *Heflin* this Court had not required a new trial where the petitioner had been sentenced to consecutive terms upon conviction of theft and receiving, but had merely set aside the conviction for receiving. The different result was reached in *Milanovich*, as was stated by the Court, for the reason that in *Heflin* the Court was not concerned with the correctness of any jury instructions, that case being a collateral proceeding to correct an illegal sentence where the petitioner was asking only that the cumulative punishment imposed for receiving be set aside. This Court granted the only relief sought in that case. The *Milanovich* case, by contrast, was a direct review of the convictions, presenting the entire record of the trial. The Court pointed out that it was impossible to know what verdict would have been returned had the

jury been properly instructed. In explaining why a new trial was necessary, the Court stated (365 U.S. 554, 555-556):

> Though setting aside the shorter concurrent sentence imposed upon the wife for receiving, the Court of Appeals left standing a ten-year prison term for larceny, double the punishment that had been imposed on the husband for the identical offense. Yet there is no way of knowing whether a properly instructed jury would have found the wife guilty of larceny or of receiving (or, conceivably, of neither). Thus, we cannot say that the mere setting aside of the shorter concurrent sentence sufficed to cure any prejudice resulting from the trial judge's failure to instruct the jury properly. It may well be, as the Court of Appeals assumed, that the jury, if given the choice, would have rendered a verdict on the larceny count, and that the trial judge would have imposed the maximum ten-year sentence on that count alone. But for a reviewing court to make those assumptions is to usurp the functions of both the jury and the sentencing judge.

That statement of the Court, made in 1961, is equally true today and is applicable to this case. Here, just as in *Milanovich*, Sellers was convicted under the instructions of the trial court which permitted convictions for antithetical, separate, distinct and incompatible offenses. The offenses were distinct in time and were proved at trial by distinctly separate evidential facts. As is admitted by the Government in its brief in *United States* v. *Gaddis*, No. 74-1141, page 24,

> Because *Milanovich* involved separate criminal transactions proved at trial with separate evidence, it was arguably appropriate for the Court implicitly to con-

clude that there was no priority between the offenses and to allow the jury to express a preference unbridled by rules of priority.

This Court, in deciding *Milanovich* subscribed to Judge Sobeloff's dissent from the majority opinion of the Fourth Circuit (275 F.2d 716, 721). This does not necessarily mean that this Court adopted his reasoning and all that is said in the dissent, but reference to it will disclose that he rejected the arguments urged here by the Government. At page 724, after rejecting the Government's arguments, Judge Sobeloff said:

> To summarize: Just as it is not for judges, but for the jury, where a jury trial has been prayed, to find a verdict of guilty, however plain the case may appear to be, so judges may not assume to choose between alternatives available to the jury. Judges may not do so even for the laudable purpose of preventing the possibility of error on the jury's part. Likewise, if guilt is pronounced on two counts where under proper instructions conviction could be permitted on only one, neither the district judge nor the appellate judges may take it upon themselves to speculate which count the twelve jurors would have unanimously picked if they had been correctly instructed. Virginia Milanovich was entitled to have the choice made under proper instructions by the jury before whom she elected to be tried; without this she may not be deprived of her liberty.

The Fourth Circuit in this case concluded correctly that the case was improperly submitted to the jury under instructions which allowed the jury to convict Sellers of both possession of stolen bank funds under 18 USC 2113(c) and theft of the same funds under 18 USC 2113(a), (b)

and (d). This opinion was consistent with its earlier opinion in *United States* v. *Harris*, 4 Cir., 346 F.2d 183; with *Heflin* and *Milanovich*; and with *Thomas* v. *United States*, 5 Cir., 418 F.2d 567; *Jenkins* v. *United States*, 10 Cir., 361 F.2d 615; *United States* v. *Abercrombie*, 5 Cir., 480 F.2d 961; *Baker* v. *United States*, 5 Cir., 357 F.2d 11; *United States* v. *O'Neil*, 9 Cir., 436 F.2d 571; *United States* v. *Roach*, 3 Cir., 321 F.2d 1; *Glass* v. *United States*, 10 Cir., 351 F.2d 678; *United States* v. *Suel*, 5 Cir., 435 F.2d 1272; *O'Claire* v. *United States*, 1 Cir., 470 F.2d 1199; *United States* v. *White*, 5 Cir., 440 F.2d 978; and *Forrester* v. *United States*, 5 Cir., 456 F.2d 905, among others. cf. *Keating* v. *United States*, 9 Cir., 413 F.2d 1038, a 28 USC 2255 proceeding.

Since the decision below is correct in its recognition of the existing law applicable to the multiple convictions as to both theft and receiving (or possession), the effort of the Government to obtain review of this decision and/or to persuade this Court to overrule *Milanovich* should be denied. We most earnestly urge, however, that Sellers' Petition for the Writ in 74-6503 be granted as to all questions there presented.

CONCLUSION

For the reasons stated herein, the cross-petition of the United States for the writ of certiorari in this case should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that true copies of the foregoing Response to Cross-Petition of the United States for a Writ of Certiorari were deposited in the United States Post Office, postage prepaid, addressed to Robert H. Bork, Solicitor General of the United States, Department of Justice, Washington, D.C., this date.

This the 21st day of October, 1975.

ROBERT B. THOMPSON